

ORIGINAL

Before the
Federal Communications Commission
 Washington, D.C. 20554

AUG 21 2003

In the Matter of	)	EB Docket No. 02-21	FEDERAL COMMUNICATIONS COMMISSION
PENINSULA COMMUNICATIONS, INC.	)	File No. EB 01-IH-0609	OFFICE OF THE SECRETARY
Licensee of stations	)	FRN: 0001-5712-15	
KGTL, Homer, Alaska;	)	Facility ID Nos. 52152	
KXBA(FM), Nikiski, Alaska;	)	86717	
KWVV-FM, Homer, Alaska; and	)	52145	
KPEN-FM, Soldotna, Alaska.	)	52149	
Licensee of FM translator stations)		
K292ED, Kachemak City, Alaska	)	52150	
K285DU, Homer, Alaska;	)	52157	
K285EG and K272DG, Seward, Alaska	)	52158 and 52160	
Former licensee of FM translator stations)		
K285EF, Kenai, Alaska;)		
K283AB, Kenai/Soldotna, Alaska;)		
K257DB, Anchor Point, Alaska;)		
K265CK, Kachemak City, Alaska;)		
K272CN, Homer, Alaska; and)		
K274AB and K285AA, Kodiak, Alaska)		

To: The Commission

EXCEPTIONS AND BRIEF OF PENINSULA COMMUNICATIONS, INC.
TO
THE INITIAL DECISION OF CHIEF ADMINISTRATIVE LAW JUDGE
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Date: August 21, 2003

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
SUMMARY.....	iv
I. STATEMENT OF THE CASE.....	2
II. QUESTIONS OF LAW PRESENTED.....	8
III. ARGUMENTS	
A. THE ALJ'S DETERMINATION TO IMPOSE A SANCTION NOT CONTEMPLATED IN THE OSC AND TO SELECTIVELY REVOKE THE LICENSES FOR KWVV-FM AND KPEN-FM VIOLATED PCI'S RIGHTS TO ADMINISTRATIVE DUE PROCESS AND WAS ARBITRAY, CAPRICIOUS, NOT SUPPORTED BY THE RECORD AND UNLAWFUL.....	9
B. ASSUMING <i>ARGUENDO</i> THAT THE ALJ HAD THE DISCRETION TO ISSUE A SANCTION OF LICENSE REVOCATION AGAINST PART, BUT NOT ALL, OF PCI'S LICENSES EVEN THOUGH HE FOUND PCI WAS QUALIFIED TO CONTINUE TO BE A COMMISSION LICENSEE, HIS DETERMINATION TO REVOKE THE LICENSES FOR KWVV-FM AND KPEN-FM VIOLATED PCI'S RIGHTS TO EQUAL TREATMENT, ADMINISTRATIVE DUE PROCESS AND WAS ARBITRAY, CAPRICIOUS, NOT SUPPORTED BY THE RECORD AND UNLAWFUL.....	13
C. THE ALJ ERRED IN FINDING THAT 1990 <i>REPORT AND ORDER</i> VOIDED THE <i>WRANGELL</i> WAIVERS THAT HAD BEEN GRANTED FOR THE WRANGELL TRANSLATORS AND REQUIRED PCI TO COME INTO FULL COMPLIANCE WITH THE NEW RULES AND POLICIES PROMULGATED THEREUNER BY 1994, AND SUCH A FINDING IS ARBITRARY. CAPRICIOUS, AND CONTRARY TO LAW.....	16
D. THE ALJ ERRED IN FINDING THE ACTIONS OF PCI WERE WILLFUL AND ERRED IN USING THE INCORRECT STANDARD IN MAKING SUCH A FINDING, THUS RENDERING HIS FINDING ARBITRARY,CAPRICIOUS, AND CONTRARY TO LAW.....	20
IV. CONCLUSION.....	21

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Amendment of Part 74 of the FM Commission Rules Concerning Translator Stations, Report and Order</i> , 5 F.C.C. Rcd 7212 (1990); <i>recon. denied, Memorandum, Opinion and Order</i> , 8 F.C.C. Rcd 5093 (1993).....	3,4,17,18
<i>Contemporary Media, Inc.</i> , 10 FCC Rcd 13685 (1995).....	10
<i>Garrett v. F.C.C.</i> , 513 F.2d 1056 (1975).....	16
<i>Hess & Clark, Division of Rhodia, Inc. v. Food & Drug Administration</i> , 495 F.2d 975 (DC Cir.1974)	12
<i>In The Matter Of Ronald Brasher Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing</i> , 15 FCC Rcd 16,326 (2000).....	10
<i>In The Matter Of Ronald Brasher FCC 03D-02</i> , (released August 8, 2003).....	10
<i>James A. Kay, Jr.</i> , 17 F.C.C. Rcd 1834 (2002), <i>recon.</i> , 17 F.C.C. Rcd 8554 (2002)...	14,16
<i>Marc Sobel</i> , 17 F.C.C. Rcd 1872 (D.C. Cir 2002).....	15
<i>Marco Sales Co. v. F.T.C.</i> , 453 F.2d 1 (1971).....	16
<i>Monroe County Commn'rs</i> , 72 F.C.C. 2d 683, 685 (1979).....	17
<i>North Alabama Express, Inc. v U.S.</i> , 585 F.2d 783 (D. C. Cir. 1978).....	12
<i>Peninsula Communications, Inc.</i> , 16 F.C.C. Rcd 11364 (2001).....	4,7,18,21
<i>Peninsula Communications, Inc. v. F.C.C.</i> , No. 01-1273, <i>per curiam Judgment and Memorandum</i> filed January 30, 2003(DC Cir).....	6
<i>Peninsula Communications, Inc Memorandum Opinion And Order</i> [Seward, Alaska] FCC 03-37, released March 10, 2003.....	6
<i>Peninsula Communications, Inc Notice of Apparent Liability for Forfeiture and Order</i> , 16 F.C.C. Rcd 16124 (2001).....	5
<i>Peninsula Communications, Inc., Order to Show Cause</i> , 17 F.C.C. Rcd 2838 (2002)....	5,9

<i>Pfizer v. Richardson</i> 434 F.2d 536 (2d Cir. 1970).....	12
<i>Pinelands, Inc.</i> , 7 FCC Red 6058 (1992).....	5
<i>Policy Regarding Character Qualifications In Broadcast Licensing</i> , 102 F.C.C. 2d 1179 (1986).....	14
<i>Robertson v. F. T.C.</i> , 415 F.2d 49 (D. C. Cir. 1969).....	12
<i>Sea Island Broadcasting Corp v. FCC.</i> , 627 F.2d 240 (D.C. Cir 1978), <i>cert. denied</i> 101 S. Ct. 105 (1980).....	20,21
<i>Steadman v. S.E.C.</i> , 450 U.S. 91 (1981), <i>rehearing denied</i> 451 U.S. 933 (1982).....	15,19
<i>Swan Creek Communications v. F.C.C.</i> 39 F.2d 1217 (D. C. Cir. 1994).....	22
<i>Wrangell Radio Group</i> , 75 F.C.C. 2d 404 (1980).....	3,4,17

SUMMARY

In theses Exceptions and Brief, Peninsula Communications, Inc. (hereafter "PCI") excepts to the INITIAL DECISION OF CHIEF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL (hereafter the "ID" by the "ALJ"), FCC 03D-01 (released on June 19, 2003) which recommends that the maximum sanction of revocation be imposed upon the licenses for two of PCI's full service FM stations: KWVV-FM Homer, Alaska and KPEN-FM, Soldotna, Alaska. The sanctions against the licenses for these two stations was recommended by the ALJ in spite of the fact that the record in this proceeding demonstrates conclusively that PCI has operated KWVV-FM and KPEN-FM for twenty (20) years without ever receiving any notification that its operation of the stations violated any FCC rule or policy, and without PCI ever being so much as admonished for its operation thereof. In fact, the record demonstrates that PCI has been an exemplary FCC licensee and trustee for these licenses over the years, and was a pioneer in establishing these stations, and others, in the State of Alaska.

In addition to these two full service FM stations, PCI, a corporation owned and operated by David Becker and Eileen Becker, husband and wife, was licensed to operate a number of low power FM translator stations in remote areas in the State of Alaska. These stations began operation in 1984 and were authorized by the Commission with licenses approved with waivers of certain of the FM translator rules under a Commission policy first enunciated in the case *Wrangell Radio Group*, 75 F.C.C. 2d 404 (1980). However, in 1995, the Commission staff informed PCI that it could no longer operate its FM translators due a change in the policies governing such stations, and in spite of the

fact the Order making those changes clearly indicated that the changes provided therein would have no impact on the licensing and operation of *Wrangell* FM translators in Alaska.

This proceeding arose because PCI temporarily continued to operate its *Wrangell* translators while it sought judicial review of the FCC's termination order in the United States Court of Appeals for the District of Columbia, but after the deadline set by the FCC for such termination. The order for PCI to terminate the operation of these translators during the pendency of its court appeal set precedent as the first time a broadcast licensee has been required to make such a cessation of operation.

The sole issue designated in this proceeding specified whether PCI's actions in this regard rendered it unqualified from a character standpoint to continue to hold all of its broadcast licenses, and placed the burden on the Enforcement Bureau to prove this was the case. The Bureau failed to meet the burden of proof and the ID finds that PCI's actions do not render it unqualified to hold its broadcast licenses. Nevertheless, in the ID the ALJ revokes the licenses for KWVV-FM and KPEN-FM, two of PCI's four full power stations as a penalty even though PCI prevailed on the ultimate question of law and fact. The recommendation in the ID should be rescinded, and the licenses for PCI's two FM stations should be reinstated.

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To: The Commission

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TO
THE INITIAL DECISION OF CHIEF ADMINISTRATIVE LAW JUDGE
RICHARD L. SIPPEL

Peninsula Communications, Inc. (hereafter "PCI"), by its undersigned counsel and pursuant to the provisions of Section 1.276 of the Commission's Rules and Regulations¹ hereby respectfully submits these Exceptions to the INITIAL DECISION OF CHIEF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL (hereafter the "ID" by the "ALJ"), FCC 03D-01 (released on June 19, 2003), in the above-captioned proceeding.²

¹ 47 CFR 1.276.

² The date for the submission of these Exceptions was extended to August 21, 2003, by

I. STATEMENT OF THE CASE³

1. In 1976, David Becker and his wife Eileen Becker moved from California to Alaska. PCI was formed by them in 1978. David and Eileen Becker are sole owners, each holding 50 percent. In September 1979, PCI received a license for KGTL-FM (now KWVV-FM), which became Homer, Alaska's first commercial FM station. In 1984, PCI added a second full service FM station, KPEN-FM, licensed to the small community of Soldotna, Alaska. In subsequent years, PCI continued its pioneering efforts in broadcasting in Alaska and acquired licenses for, built, and operated KXBA-FM, Nikiski, Alaska, and KGTL(AM), Homer, Alaska. In the 24 years that PCI has operated these stations, it has not received any citation, forfeiture, or other admonishment from the Commission in connection with its stewardship of these licenses. Its regulatory record as a licensee of the FCC has been spotless for its full power stations. ID at paras. 12-14.

2. In addition, over this same period of time PCI was issued licenses by the Commission to operate low power FM translator stations in certain small Alaskan communities.⁴ These included K285EF Kenai; K283AB Kenai/Soldotna; K257DB Anchor Point; K265CK Kachemak City; K272CN Homer; K274AB and K285AA Kodiak; K292ED, Kachemak City; K285DU, Homer; and K285EG and K272DG,

the Order, FCC 031-01 (released on July 11, 2003) pursuant to a Consent Motion For Extension of Time by PCI.

³ The subject matter of this proceeding has been before the Commission since 1995, and, as the U.S. Court of Appeals for the Ninth Circuit has noted, has involved "complex procedural turns" and "complex procedural complications." *U.S. v. Peninsula Communications, Inc.* 287 F.3d at 382-383 (2002). Accordingly, PCI's Statement of the Case will, of necessity and in fairness, contain a slightly more expansive statement of the case in order to give the Commission a full appreciation for the scope and breadth of the matter. PCI respectfully requests the Commission's kind indulgence in this regard.

⁴ FM translators are low-power stations that receive the weak signals of full service FM stations and retransmit a stronger signal on another frequency. The Commission first authorized translators in 1970 to provide FM service to those unable to receive satisfactory service due to distance or terrain obstructions.

Seward, Alaska. ID at para. 15. These translators rebroadcast the signals of full power FM stations KWVV-FM and KPEN-FM pursuant to licenses issued by the Commission. Id. In the cases of K285EF Kenai; K283AB Kenai/Soldotna; K257DB Anchor Point; K265CK Kachemak City; K272CN Homer; and K274AB and K285AA Kodiak, Alaska, (the “Wrangell Translators”), PCI obtained FM translator rule waivers to retransmit its stations in a manner that would otherwise not be allowed under the Commission’s FM translator rules. ID at para. 53. These waivers were granted under a policy first enunciated in *Wrangell Radio Group*, 75 F.C.C. 2d 404 (1980), pursuant to which the Commission decided to make special allowances for such waivers in Alaska due to the “unique terrain, its remoteness and isolation.” Id. PCI was granted licenses for these Wrangell Translators pursuant to *Wrangell*, and has dutifully built and operated the translators in these small communities since 1984.

3. In 1990, the Commission adopted stricter FM translator rules and standards. *See Amendment of Part 74 of the FM Commission Rules Concerning Translator Stations, Report and Order*, 5 F.C.C. Rcd 7212 (1990) (“*Report and Order*”) *recon. denied*, *Memorandum, Opinion and Order*, 8 F.C.C. Rcd 5093 (1993). ID at paras. 20-21. After 1990, FM translator waivers were generally favored only in areas which otherwise received no signal, or so- called “white” areas. FM translators, such as PCI’s Wrangell Translators, that were operating before March 1, 1991, could continue to operate until March 1, 1994. However, the Commission indicated that it would continue to make special allowance for *Wrangell* waivers, previously granted or prospective, in Alaska, noting in **Footnote 59**⁵ to the *Report and Order* that:

⁵ 5 F.C.C. Rcd 7212, 7245 n. 59 (1990).

We intend that our decisions herein **not alter in any fashion the special treatment we accord Alaska, Wrangell Radio Group, 75 FCC2d 404 (1980).** Upon appropriate showing the Commission has accommodated Alaska's unique lack of adequate communications services by granting waivers allowing program origination, alternative signal delivery, and cross-service translating. (emphasis added).

Therefore, PCI determined that it need not meet the March 1, 1994 compliance deadline specified in the *Report and Order* since the licenses for its Wrangell Translators were granted pursuant to the *Wrangell* policy..... a policy that was not altered **in any fashion** by the *Report and Order*. PCI Findings at para 10. PCI's determination to act in conformity with the plain meaning of the language contained in **Footnote 59**, and the Media Bureau's determination to force PCI to discontinue the operation of the Wrangell Translators in spite of the plain meaning of the language in **Footnote 59**, is the heart of the subject proceeding, which has been before the Commission since 1995.

4. In 1995, the Media Bureau ordered PCI to cease the operation of its Wrangell Translators in connection with the filing of license renewal applications for the facilities, and in spite of the plain meaning of **Footnote 59**. ID at paras. 20-24. Thus began the arduous process that resulted in PCI twice going to the United States Court of Appeals for the District of Columbia Circuit, as well as the United States District Court for Alaska and the United States Court of Appeals for the Ninth Circuit, in an attempt to get an explanation as to why its interpretation of the plain meaning of **Footnote 59** was erroneous, and why the Commission's staff believed that the *Report and Order* mandated the termination of PCI's operation of the Wrangell Translators.

5. In response to a D.C. Circuit decision on its first appeal, the Commission ordered PCI to terminate the operation of its Wrangell Translators by May 19, 2001. *Memorandum Opinion and Order and Order to Show Cause*, 16 F.C.C. Rcd 11364,

11371 (2001) (hereafter the “*Termination Order*”). This action was in contradiction of a long established Commission policy permitting a disqualified broadcast licensee to continue the operation of its station during judicial appeals in order to ensure continuing service to the public until the court resolved the licensee’s qualifications. *Pinelands, Inc.*, 7 FCC Red 6058, 6061 n.12 (1992) and ID at para. 48. PCI filed a timely appeal of the *Termination Order* with the United States Court of Appeals for the D.C. Circuit and subsequently filed a motion for stay with the Court. It also honestly and forthrightly notified the Commission that, consistent with past Commission policy, it intended to continue to operate the translators while its appeal was pending before the D. C. Circuit, in conformity with *Pinelands, Inc. Id.*

6. On August 29, 2001, the Commission released its *Notice of Apparent Liability for Forfeiture and Order*, 16 F.C.C. Rcd 16124 (2001) (“*NAL*”), notifying PCI that further operation of the seven Wrangell FM translators might raise serious questions about PCI’s qualifications to be a Commission licensee, and also might result in proceedings leading to revocation of all of PCI’s broadcast licenses. On February 6, 2002, the Commission released its *Forfeiture Order*, 17 F.C.C. Rcd 2832 (2002), finding that PCI “willfully and repeatedly” failed to comply with Section 301 of the Communications Act of 1934, and assessed a **\$140,000.00** forfeiture against PCI for continuing to operate the Wrangell Translators while its appeal was pending before the D.C. Circuit.

7. On that same date, the Commission commenced this proceeding to determine whether or not all broadcast licenses held by PCI should be revoked. In the *Matter of*

Peninsula Communications, Inc., Order to Show Cause, 17 F.C.C. Rcd 2838 (2002)

("OSC"), the Commission specified the following issues:

(a) To determine the facts and circumstances surrounding Peninsula Communications, Inc.'s operation of former FM translator stations 285EF, Kenai; K283AB Kenai/Soldotna; K257DB Anchor Point; K265CK, Kachemak City; K272CN, Homer; and K274AB and K285AA, Kodiak, all in Alaska, subsequent to August 29, 2001, contrary to the Commission's order in *Peninsula Communications, Inc., 16 F.C.C. Rcd 11364 (2001)*, and related violation of § 416(c) of the Act;

(b) To determine, in light of the evidence adduced pursuant to issue (a), whether Peninsula Communications, Inc. has the requisite character qualifications to be a Commission licensee and thus whether its captioned broadcast and FM translator licenses, including any former licenses reinstated, should be revoked.

The burden of the introduction of evidence and the burden of proving that PCI lacked the requisite character qualifications to be a Commission licensee were assigned to the Enforcement Bureau ("Bureau"). OSC, id.

8. On August 28, 2002, and prior to the commencement of the hearing in this proceeding, PCI shut down the Wrangell Translators in conformity with the *Termination Order* and they have remained off the air since that time.⁶ The D.C. Circuit upheld the *Termination Order* five (5) months later in *Peninsula Communications, Inc. v. F.C.C.*, No. 01-1273, *per curiam Judgment and Memorandum* filed January 30, 2003. However, by that time PCI had already come into compliance with the *Termination Order*.

9. A hearing was conducted in Washington, D.C. from September 24 through 26, 2002, a supplementary admissions session was conducted on October 16, 2002, and the Presiding Judge closed the record on October 18, 2002. The parties filed Proposed

⁶ ID at page 21. In addition, PCI terminated the operation of its two Seward FM translators in a timely manner on May 8, 2003, after being ordered to do so in a separate proceeding, *Memorandum Opinion And Order*, FCC 03-37, released March 10, 2003. See *Order*, FCC 03M-12, released April 18, 2003, and Official Notice Exhibit 21.

Findings on December 24, 2002, and Reply Findings on January 23, 2003. The ID was released on June 19, 2003.

10. In the ID, the ALJ found “by a preponderance of the evidence” that PCI had violated Sections 301, 312(a)(4) and 416(c) of the Communications Act “...by knowingly failing from May 19, to August 28, 2002, to observe and comply with a Commission order terminating the seven [Wrangell] FM translator licenses in Alaska.” However, the ALJ also found that neither PCI nor its two principals had at any time engaged in any deception, misrepresentation, and/or lack of candor in dealing with the Commission on this matter, that PCI had ultimately, although belatedly, complied with the *Termination Order* and terminated the operation of the Wrangell Translators on August 28, 2002, and that “...there should be no significant concern about PCI dealing honestly with the Commission in the future with respect to its Commission licenses.”

11. With regard to the ultimate issue of license revocation for all of the PCI stations, the ALJ found that this penalty was unwarranted in that:

...the sanction for any misconduct not involving misrepresentation need not be universal license revocation. And particularly pertinent to this case, the Commission has rejected any presumption that misconduct at one station means a licensee is not qualified to operate other stations....in the absence of fraud or misrepresentation, PCI’s transparent non-compliance with a Commission order pending appeals does not reach the level of “most egregious.” Thus, it is concluded that the Commission’s sanction policy does not contemplate a universal revocation of the totality of PCI’s licenses. ID paras. 71 *et. seq.*

The ALJ also noted that there were mitigating circumstances in connection with the willful violation of the rules, finding that the *Termination Order* was not “blithely ignored” but that PCI had shown ultimate compliance which deserved recognition; that this was a case in which PCI had acted in good faith in exhausting all of its legal remedies before the courts; that PCI principal David Becker was “repentant” and had

“credibly testified” that he did not want to disobey the Commission; and that there was recognition and appreciation shown by PCI for established legal processes, and that recognition and appreciation indicated a degree of reliability and rehabilitation. ID at para. 73 *et. seq.*

12. Finally, the ALJ found that the Bureau had failed to meet its burden of proving that PCI’s actions justified universal license revocation since PCI had not engaged in any form of deception, misrepresentation, or lack of candor, had not engaged in any “reprehensible conduct”, and its conduct was not shown to evidence a “cavalier disregard” of licensee obligations. ID at paras. 76-85. Therefore, on designated Issue 2, PCI prevailed and was found to be qualified to continue to hold broadcast licenses, although not qualified to hold all of its broadcast licenses.

13. The ALJ made a surprising finding that PCI should nevertheless forfeit its licenses for two of its full power FM stations, KWVV-FM and KPEN-FM, since these were the stations that had been rebroadcast by the Wrangell Translators. Thus, while PCI prevailed under designated Issue 2 and was found qualified to continue to be a Commission broadcast licensee, a sanction of license revocation for these two FM stations was deemed appropriate and was ordered. ID at Order clause. This action was erroneous, as were others taken by the ALJ in this proceeding, and to which PCI excepts.

II. QUESTIONS OF LAW PRESENTED.

A. WHETHER THE ALJ'S DETERMINATION TO IMPOSE A SANCTION OF SELECTIVE LICENSE REVOCATION, WHICH WAS NOT CONTEMPLATED IN THE OSC, AND REVOKE THE LICENSES FOR KWVV-FM AND KPEN-FM VIOLATED PCI'S RIGHTS TO ADMINISTRATIVE DUE PROCESS AND WAS ARBITRARY, CAPRICIOUS, NOT SUPPORTED BY THE RECORD AND UNLAWFUL.

B. ASSUMING *ARGUENDO* THAT THE ALJ HAD THE DISCRETION TO ISSUE A SANCTION OF LICENSE REVOCATION AGAINST SELECTIVE, BUT NOT ALL, OF PCI'S LICENSES, WHETHER HIS DETERMINATION TO REVOKE THE LICENSES FOR KWVV-FM AND KPEN-FM VIOLATED PCI'S RIGHTS TO ADMINISTRATIVE DUE PROCESS AND WAS ARBITRARY, CAPRICIOUS, NOT SUPPORTED BY THE RECORD AND UNLAWFUL.

C. WHETHER THE ALJ ERRED IN FINDING THAT 1990 *REPORT AND ORDER* VOIDED THE *WRANGELL* WAIVERS THAT HAD BEEN GRANTED FOR THE WRANGELL TRANSLATORS, AND REQUIRED PCI TO COME INTO FULL COMPLIANCE WITH THE NEW RULES AND POLICIES PROMULGATED THEREUNTER IN 1994, AND WHETHER SUCH A FINDING WAS ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW.

D. WHETHER THE ALJ ERRED IN FINDING THE ACTIONS OF PCI WERE WILLFUL AND ERRED IN USING THE INCORRECT STANDARD IN MAKING SUCH A FINDING, THUS MAKING HIS FINDING ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW.

III. ARGUMENTS

A. THE ALJ'S DETERMINATION TO IMPOSE A SANCTION NOT CONTEMPLATED IN THE OSC AND TO SELECTIVELY REVOKE THE LICENSES FOR KWVV-FM AND KPEN-FM VIOLATED PCI'S RIGHTS TO ADMINISTRATIVE DUE PROCESS AND WAS ARBITRARY, CAPRICIOUS, NOT SUPPORTED BY THE RECORD AND UNLAWFUL.

14. The OSC specified two, and only two, issues upon which evidence was to be taken and upon which the ALJ was to make findings of fact and conclusions of law.

These two issues were:

(a) To determine the facts and circumstances surrounding Peninsula Communications, Inc.'s operation of former FM translator stations 285EF, Kenai; K283AB Kenai/Soldotna; K257DB Anchor Point; K265CK, Kachemak City; K272CN, Homer; and K274AB and K285AA, Kodiak, all in Alaska, subsequent to August 29,

2001, contrary to the Commission's order in Peninsula Communications, Inc., 16 F.C.C. Rcd 11364 (2001), and related violation of § 416(c) of the Act;

(b) To determine, in light of the evidence adduced pursuant to issue (a), whether Peninsula Communications, Inc. has the requisite character qualifications to be a Commission licensee and thus whether its captioned broadcast and FM translator licenses, including any former licenses reinstated, should be revoked.

Unlike other license revocation proceedings, the issues specified against PCI did not include possible sanctions other than whether all of PCI's "broadcast and FM translator licenses....should be revoked." OSC at para 6. The OSC did not authorize the ALJ to make a determination that PCI should be issued a monetary forfeiture, or should be subject to individual license revocations, based on the record developed in the proceeding. PCI was not given notice in the OSC that partial license revocation was a possible outcome of the proceeding.

15. For example, in *Contemporary Media, Inc.*, 10 FCC Rcd 13685 (1995), the *Order To Show Cause* included a contingent issue in the event that the hearing record did not warrant revocation of all of the Licensee's authorizations, whether some other sanction, i.e. a forfeiture, would be appropriate. Similarly, in *Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing*, 15 FCC Rcd 16,326 (2000), in the proceeding *In The Matter Of Ronald Brasher* FCC 03D-02,(released August 8, 2003), a separate issue was designated "(e) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether any or all of the above-captioned licenses should be revoked." There was no such issue designated for revocation of fewer than all of the PCI licenses in this proceeding. The OSC limited the ALJ to ultimate findings of fact and conclusions of law on one, single issue.....whether PCI has the requisite character qualifications to be a Commission licensee and continue

to hold all of its licenses, and placed the burden on the Bureau to prove that PCI was not qualified to hold all of its existing licenses. The ALJ was delegated authority only to give PCI either an “up or down” on whether it possessed the character qualifications to continue to hold all of its broadcast licenses. The OSC did not specify that any other sanctions were to be leveled against PCI pursuant to the hearing proceeding, including the revocation of only selected licenses held by PCI. PCI was not given due notice in the OSC that it might be subject to any sanction other than universal license revocation.⁷

16. As shown previously, the ALJ determined in light of the evidence adduced in the hearing that while PCI may have been guilty of a willful, albeit temporary, transgression in violation of the Commission’s *Termination Order*, its transgression was not so egregious as to merit a finding that PCI lacked the requisite character qualifications to be a Commission licensee. Accordingly, the ALJ specifically concluded under the heading “Multiple [License] Revocations” that:

As discussed below, in the absence of fraud or misrepresentation, PCI’s transparent non-compliance with a Commission order pending appeals does not reach the level of “most egregious.” Thus, it is concluded that the Commission’s sanction policy does not contemplate a universal revocation of the totality of PCI’s licenses. ID at para. 74, page 26.

Similarly, therefore, the ALJ found that the Bureau had failed to prove that Issue 2, universal license revocation, should be resolved in a manner adverse to PCI, and PCI prevailed under the issue as being affirmatively found to possess the requisite character qualifications to continue to be a Commission licensee.

⁷ In a telling observation in paragraph 14 to the ID, the ALJ observes that “PCI has not been directly penalized with respect to its full power FM stations.” PCI had been directly penalized through the termination of the licenses for the Wrangell Translators and by a \$140,000 forfeiture, among other things. It was not the mission of the ALJ under the designated issues in the OSC to find a reason to “penalize” PCI “with respect to its full power FM stations” and in so doing the ALJ exceeded his authority under the OSC, acted in an arbitrary and capricious manner, and denied PCI administrative due process.

17. Federal agencies, including the Commission and its administrative law judges on designation, are bound by the requirements of reasonable notice prescribed in the Administrative Procedure Act, 5 U.S.C. 554. *See, North Alabama Express, Inc. v U.S.*, 585 F.2d 783 (1978). Reasonable notice of the full extent to which the legally protected interests of licensees may be adversely effected by an administrative action are a basic and fundamental requirement of administrative due process under the APA. *North Alabama Express, Inc., supra*. Notice must be specific as to all of the possible outcomes of an administrative proceeding. *Hess & Clark, Division of Rhodia, Inc. v. Food & Drug Administration*, 495 F.2d 975 (DC Cir.1974) and *Pfizer v. Richardson* 434 F.2d 536 (2d Cir. 1970). This specificity is equally applicable to not only the bases for adjudication, but the possible remedies or sanctions that may result. *Robertson v. F. T.C.*, 415 F.2d 49 (1969). In the case at hand, PCI was never placed on notice that it might be subject to selective, and partial, license revocation of two of its full power FM stations upon a finding in its favor on the only designated issue....whether or not it was qualified to continue to be a licensee of the Commission. Before PCI could be subject to such an outcome, the APA requires that it be notified that such selective license revocation could result even in the event that the basic character issue was resolved, as it was, in its favor. By taking such an action in light of the finding that PCI was qualified to continue to hold its broadcast licenses, the ALJ exceeded the authority delegated to him in the OSC, and violated PCI's administrative due process rights to participate in an adjudicatory proceeding knowing the possible outcomes thereof. Such an action by the ALJ was arbitrary, capricious, an abuse of discretion, and unlawful, and should be reversed by the Commission in favor of the reinstitution to PCI of the licenses for KWVV-FM and

KPEN-FM based on the ALJ's ultimate finding that PCI continues to possess the character qualifications to hold broadcast licenses.

B. ASSUMING *ARGUENDO* THAT THE ALJ HAD THE DISCRETION TO ISSUE A SANCTION OF LICENSE REVOCATION AGAINST PART, BUT NOT ALL, OF PCI'S LICENSES EVEN THOUGH HE FOUND PCI WAS QUALIFIED TO CONTINUE TO BE A COMMISSION LICENSEE, HIS DETERMINATION TO REVOKE THE LICENSES FOR KWVV-FM AND KPEN-FM VIOLATED PCI'S RIGHTS TO EQUAL TREATMENT, ADMINISTRATIVE DUE PROCESS AND WAS ARBITRARY, CAPRICIOUS, NOT SUPPORTED BY THE RECORD AND UNLAWFUL.

18. While the ALJ concluded that PCI possessed the basic character qualifications to continue to remain an FCC licensee, he nevertheless also concluded that a license revocation of some sort was warranted. ID at para 70. He noted that:

However, in view of a Commission policy to revoke only offending licenses, it is concluded that under the particular facts of this case, revocation of non-"network" PCI licenses would be inappropriate, and also would be inconsistent with Commission precedent.

The ALJ defined the PCI "network" of stations as including the 7 Wrangell Translators and the two full power stations that were rebroadcast on the translators....KWVV-FM, Homer, Alaska, and KPEN-FM, Soldotna, Alaska. ID at para 15. There is no evidence in the record of this proceeding that PCI was ever ordered to cease feeding the 7 Wrangell Translators with the signals of KWVV-FM and/or KPEN-FM. There is no evidence in the record of this proceeding that PCI has ever operated KWVV-FM and/or KPEN-FM in any manner inconsistent with the licenses for the stations, or in violation of the FCC's rules, regulations or policies. To the contrary, the record does reflect that PCI and Mr. and Mrs. Becker over their 23 years in operating KWVV-FM and KPEN-FM have maintained a clean regulatory record of operation, and have never been fined or otherwise admonished in their operation of those stations. PCI Exhibit 1 at page 11.

19. The ALJ acknowledges, correctly, that the Commission has “...rejected any presumption that misconduct at one station means a licensee is not qualified to operate other stations”, citing *Policy Regarding Character Qualifications In Broadcast Licensing*, 102 F.C.C. 2d 1179, 1224 (1986) (“*Character Policy Statement*”) [no presumption that misconduct at one station means a licensee is unqualified to operate others] However, he then finds that the temporary misconduct of PCI in operating its Wrangell Translators following the *Termination Order* “translates” into a justification to revoke the licenses of two full power FM stations with regard to which the record reflects only exemplary and long standing FCC regulatory compliance.....KWVV-FM and KPEN-FM. Such a determination is unreasonable, unsupported by any record evidence and at variance with established Commission precedent in such cases involving a licensee of stations in different radio services.

20. As noted in the ID, in a Commission decision cited and relied on by the Bureau, *James A. Kay, Jr.*, 17 F.C.C. Rcd 1834 (2002), *recon.*, 17 F.C.C. Rcd 8554 (2002),⁸ the Commission held:

The misconduct found here --- involves only stations operating on the 800 MHz band. We find that the revocation of --- licenses for stations operating on this band will serve as a significant deterrent to future misconduct. --- We therefore limit the sanction --- to revocation of the 25 licenses for his stations operating on the 800 MHz band.

17 F.C.C. Rcd at 1865, and 17 F.C.C. Rcd at 8558. But, the Commission did not revoke any licenses that Kay held in services other than the 800 MHz band. *Id.* at Para. 108.

Moreover, in a companion case, also on appeal, the Commission revoked 15 licenses for SMR stations in the 800 MHz band but again did not revoke any licenses that were held

⁸ Appeal pending *sub nom.* *James A. Kay, Jr. v. F.C.C.*, No. 02-1175 (D.C. Cir. June 5, 2002).

by the licensee in other services. *Marc Sobel*, 17 F.C.C. Rcd 1872, 1894 (2002). The reasons for not revoking all licenses were Commission conclusions that the misconduct, which involved misrepresentation, unlike the case at hand here, did not affect any other types of licensed facilities of the licensees. *See Marc Sobel*, 17 F.C.C. Rcd at 1893. Such is the case at hand where there is no evidence that any wrongdoing in connection with the delayed termination of the Wrangell Translators had any connection or other nexus with the unblemished FCC regulatory records of KWVV-FM and KPEN-FM. It is clear that in adjudicatory proceedings before the Commission Section 7(c) of Administrative Procedure Act, 5 U.S.C. 7(c), applies and a sanction may not be imposed except on consideration of the whole record or parts thereof cited by a party and supported by and in accordance with reliable, probative and substantial evidence. *Steadman v. S. E. C.*, 101 S.Ct. 999 (1981). There is no probative or substantial evidence in the record of this proceeding to support any wrongdoing in connection with any facilities other than FM translators, and the revocation of the KWVV-FM and KPEN-FM licenses is unwarranted, arbitrary, capricious and contrary to law.

21. The ID notes that “PCI has not been directly penalized with respect to its full power FM stations.” ID a para. 14. There is no basis in fact, law or FCC policy for PCI to be punished in this manner. Rather, to the extent that a proper sanction mandates license revocation, it should be those licenses held by PCI in the same service as the licenses involved in the failure to comply with the *Termination Order*....the FM translator service. PCI holds additional FM translator licenses for K292ED Kachemak City, K285DU, Homer and K285EG and K272DG, Seward, Alaska. ID at para. 16. In a worst case analysis, the only additional revocation that should take place would be for the

other stations PCI is licensed to operate in the FM translator service, and in conformity with Commission precedent. *See, Kay, supra* and *Marc Sobel, supra*. Assuming *arguendo* that the ALJ has the discretion to implement the sanction of selective license revocation based on the facts of this case, longstanding Commission precedent requires that it be PCI's licenses in the same service as the "offending stations"...the FM translator service...and not licenses held by PCI in the separate full service FM stations service. *See, Garrett v. F.C.C.*, 513 F.2d 1056 (1975) [equal treatment must be accorded FCC licensees for similar conduct] and *Marco Sales Co. v. F.T.C.*, 453 F.2d 1 (1971) [or the agency is obligated to explain the differential treatment given to a licensee for the same conduct].

C. THE ALJ ERRED IN FINDING THAT THE 1990 *REPORT AND ORDER* VOIDED THE *WRANGELL* WAIVERS THAT HAD BEEN GRANTED FOR THE *WRANGELL* TRANSLATORS AND REQUIRED PCI TO COME INTO FULL COMPLIANCE WITH THE NEW RULES AND POLICIES PROMULGATED THEREUNTER BY 1994, AND SUCH A FINDING IS ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW.

22. The ID indicates in its ultimate findings of fact that "in launching its 'network' during the 1980s, PCI obtained waivers to retransmit primary signals over seven [Wrangell] translators in 'other areas' which were primary areas of full service competitors" and that PCI was only authorized to operate these translators until March 1, 1994. ID at para.53. The basis for this conclusion is as follows:

11. In 1990, the Commission adopted strict FM translator waiver rules and standards. *See* discussion at Paras. 20-21, *infra*. After 1990, waivers were favored only in areas which otherwise received no signal called "white" areas. The Commission continued to make special allowance for waivers in Alaska, finding that its "unique terrain, its remoteness and isolation, justify special treatment." *Wrangell Radio Group*, 75 F.C.C. 2d 404, 407 (1980). But the new stricter rules also applied to Alaska, and PCI was bound by those rules from 1994 forward. ID at para. 11.

And further:

20. New waiver rules were adopted in 1990. *See Amendment of Part 74 of the FM Commission Rules Concerning Translator Stations, Report and Order*, 5 F.C.C. Rcd 7212, 7221, 7223, and 7245 n. 59 (1990) (“*Report and Order*”) *recon. denied*, *Memorandum, Opinion and Order*, 8 F.C.C. Rcd 5093 (1993). The rules set ownership and financial conditions for translators, and established a stricter waiver standard. *See Memorandum Opinion and Order*, 8 F.C.C. Rcd 5093, 5095 (1993) (affirming and clarifying stricter FM translator rules). These rules were stricter in order to protect existing FM stations from adverse, anticompetitive effects of translators, such as PCI’s “network.” ID at para 20.

The ALJ’s conclusion that PCI was “...bound by those rules from 1994 forward...” was erroneous as a matter of both fact and law.⁹

23. The *Report and Order* contained a clear expression of the intent of the Commission to not require FM translators in Alaska that had been licensed with waivers of the Commission’s Rules pursuant to *Wrangell Radio Group* to come into conformity with the new standards by March 1, 1994. As the record in this proceeding reflects, the Commission indicated in the *Report and Order* that it would continue to make special allowance for *Wrangell* waivers, previously granted or prospective, in Alaska, noting in **Footnote 59**¹⁰ to the *Report and Order* that:

We intend that our decisions herein **not alter in any fashion the special treatment we accord Alaska, Wrangell Radio Group, 75 FCC2d 404 (1980).** Upon appropriate showing the Commission has accommodated Alaska’s unique lack of adequate communications services by granting waivers allowing program origination, alternative signal delivery, and cross-service translating. (emphasis added).

⁹ The ALJ finds that “Translators were never intended for full service power commercial stations to rebroadcast signals beyond their primary service areas into service areas of competitors. *Monroe County Comm’n’s*, 72 F.C.C. 2d 683, 685 (1979).” ID at para 10. However, *Monroe County* involved television translators, not FM translators, and Florida, not Alaska, and is inapposite to the point made therein. *Wrangell* waivers in Alaska were specifically granted to allow for such operation by the PCI translators.

¹⁰ 5 F.C.C. Rcd 7212, 7245 n. 59 (1990).

Thus, by the clear and unambiguous language in **Footnote 59** to the *Report and Order*, the Commission notified PCI and all other licensees of FM translators in Alaska operating pursuant to *Wrangell Radio Group* waivers that nothing contained therein would alter in any fashion the authorizations pursuant to which they were operating. Correspondingly, neither PCI nor other Wrangell translator operators were required to come into compliance with the new FM translator rules and policies by the 1994 deadline, or thereafter.¹¹

24. PCI President David Becker justified in part PCI's continuing operation of the Wrangell Translators after 1994, and in spite of the *Termination Order* by the clear language and intent of **Footnote 59** in the *Report and Order*. TR 152. As Mr. Becker testified "this footnote is the heart of our case." TR 153. See also PCI Ex. 1 at 6 and PCI Ex. 6 at 60-61.

25. However, in the ID there is absolutely no discussion or mention of **Footnote 59**, or of Mr. Becker's belief that it entitled PCI to continue to operate the Wrangell Translators after 1994, and following the *Termination Order*. In its finding on PCI's actions in not terminating the operation of the Wrangell Translators in a timely manner, the ALJ characterized it as a "willful" and a "...knowing and intentional decision to disobey daily a lawful order..." ID at para. 67. However, this characterization fails to take into account PCI's reasonable and heartfelt belief that it was entitled to continue to operate its Wrangell Translators under the express language of **Footnote 59** to the *Report*

¹¹ The ID criticizes PCI for not "...down sizing its 'other area...'" translators in preparation for coming into compliance with the new FM translator rules in 1994, and finds the reason to be that PCI "...was motivated to keep operating its 'network' by the economics of PCI's business plan." The record supports a finding that PCI did not downsize because it had no reason to believe it needed to do so based on **Footnote 59**.

*and Order.*¹²

26. It is clear under the APA that in an administrative hearing a sanction may not be imposed except on consideration of the whole record and particularly those parts of the record cited and supported by the party against whom the sanction is to imposed. *See*, 5 U.S.C. 556(d) and *Steadman v. S.E.C.*, 450 U.S. 91 (1981), *rehearing denied* 451 U.S. 933 (1982). Here, the ID fails to acknowledge, must less discuss, the evidence and testimony tendered by PCI concerning **Footnote 59** in the *Report and Order*, and in support of the “heart of its case.” Such a failure rises to the level of violating the APA and the precedent developed thereunder for rational, decisioned, adjudicatory sanctions, and was arbitrary, capricious, and an abuse of the discretion accorded to the ALJ. At a minimum, basic fairness requires that after 8 long years PCI finally deserves a straight answer from the Commission on the reason PCI’s analysis of its right to continue operation of its Wrangell Translators based on **Footnote 59** in the *Report and Order* is incorrect, and did not stay the requirement that the translators come into compliance with the new FM translator standards in 1994. This point is, after all, the “heart of the matter” in this long, drawn out proceeding.¹³

¹² A determination on the **Footnote 59** matter is essential for any reasoned finding on the State of Mind showing that PCI was allowed to offer in the hearing proceeding pursuant to the ALJ’s *Order*, FCC 02M-42 (released on July 19, 2002) and upon which the ALJ made specific findings in the ID. ID at para 47 et. seq.

¹³ PCI also maintained that it was authorized to continue the operation of the translators while its appeal was pending before the D.C. Circuit under provisions of § 1.62(a)(1) and § 73.3523(d)(2) of the Commission’s Rules, and Sections 307(c)(3), 405, and 402 of the Communications Act of 1934, as amended, since its renewal applications remained pending subject to judicial review. The ALJ rejected these positions to which PCI also excepts.

D. THE ALJ ERRED IN FINDING THE ACTIONS OF PCI WERE WILLFUL AND ERRED IN USING THE INCORRECT STANDARD IN MAKING SUCH A FINDING, THUS RENDERING HIS FINDING ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW.

27. The ID finds that PCI willfully violated § 301, § 312(a)(4) and § 416(c) of the Act by knowingly failing from May 19, 2001 to August 28, 2002, to observe and comply with a Commission order terminating seven FM translator licenses in Alaska. ID at para. 57. This conclusion of law was based on a standard of a "...preponderance of the evidence..." ID at para. 57.

28. The subject proceeding involves the possible sanction of the revocation of the licenses held by PCI, which is the "ultimate sanction" under the Commission's rules and the Communications Act of 1934, as amended. While the preponderance of the evidence standard is the traditional standard for federal agency adjudicatory hearings, the United States Court of Appeals for the District of Columbia has found that in the case of FCC license revocation proceedings a higher standard of proof is required than a preponderance of the evidence. In *Sea Island Broadcasting Corp v. FCC.*, 627 F.2d 240 (D.C. Cir 1978), *cert. denied* 101 S. Ct. 105 (1980), the Court held that the "clear and convincing" standard of proof is the appropriate measure to be used in FCC license revocation proceedings. Specifically, the Court held:

After all the analysis, we stand with the view that revocation of an FCC license is governed, at the agency level, by the "clear and convincing" standard of proof set forth in the Collins decision for an SEC revocation of a broker's license. We do not believe that this standard will, as the Commission fears, "significantly burden" its efforts to regulate licensees in furtherance of the public interest. *Sea Island Broadcasting Corp v. FCC*, 627 F.2d at 244.

Here, the ID conclusion that PCI's actions in not immediately complying with the *Termination Order* were willful, as well as all other conclusions in the ID, was premised on the preponderance of the evidence standard rather than the more exacting "clear and convincing" standard. In *Sea Island Broadcasting Corp. v. FCC*, the Court remanded the proceeding to the FCC for further consideration under the clear and convincing standard. *See, Sea Island Broadcasting Corp. of S.C.*, 69 FCC 2d 1796 (1978). The Commission should, at a minimum, remand this proceeding to the ALJ for a revised consideration of the facts in the record under this more exacting standard of review and mandate a revised finding on the question of PCI's "willfulness" in temporarily delaying compliance with the *Termination Order*.

IV. CONCLUSION

29. The ALJ concluded that PCI's transgressions in not immediately complying with the *Termination Order*, which did not include any acts of deception or misrepresentation and which PCI did ultimately come into compliance with, do not support a finding that PCI lacks the basic character qualifications to remain a Commission broadcast licensee. Thus, the Bureau tried, but failed, to meet the burden of proving under Issue 2 that PCI lacked the character qualifications to remain an FCC licensee. PCI has incurred the loss of its licenses for the Wrangell Translators, a substantial money forfeiture of \$140,000.00, the costs of litigating the collection of the forfeiture, the costs of multiple Federal court appeals, the costs of this hearing and exceptions, and the loss of its so-called "network." These sanctions and costs to PCI should, in their totality, provide adequate assurance to the FCC of PCI's reliability in its future dealings with the Commission. Based on these factors, and those excepted to

herein, PCI has been penalized to the fullest extent that is reasonable under the facts and circumstances in this proceeding and it was erroneous for the ID to exact further sanctions against PCI in the form of the termination of two full power FM stations.

Swan Creek Communications v. F.C.C. 39 F.2d 1217 (1994).

Respectfully submitted,

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Date: August 21, 2003

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were sent by first class United States mail, postage pre-paid, and email on this 21st day of August, 2003:

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Chairman
Federal Communications Commission
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Washington, D.C. 20554

The Honorable Kathleen Q. Abernathy
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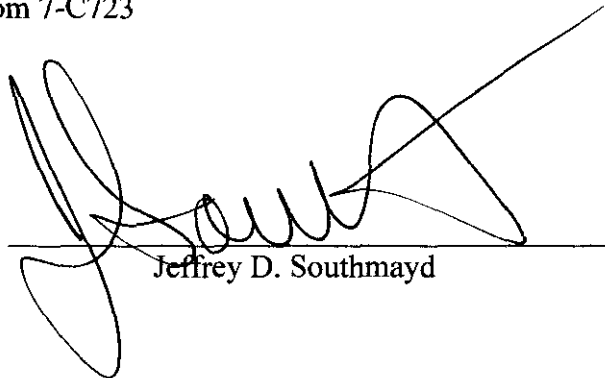
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